STATE OF MICHIGAN

IN THE SUPREME COURT

DRAGEN PERKOVIC,

Plaintiff-Appellant,

-vs-

ZURICH AMERICAN INSURANCE COMPANY,

Defendant-Appellee.
_____/

Supreme Court No. _____

Court of Appeals No. 321531

Wayne County Circuit Court
No. 09-019740-NF

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiff-Appellant, Dragen Perkovic, seeks leave to appeal from the Michigan Court of Appeals published decision dated September 10, 2015. A copy of that Opinion is Exhibit E to this brief. That opinion affirmed a circuit court decision granting summary disposition to the defendant on the basis of the one-year statute of limitation set out in MCL 500.3135(1).

Plaintiff requests that this Court grant leave to appeal to consider the important question of whether the Court of Appeals correctly interpreted MCL 500.3135(1). Alternatively, plaintiff requests that the Court summarily reverse the Court of Appeals' September 10, 2015 decision and remand this matter to the Wayne County Circuit Court for further proceedings.

STATEMENT REGARDING QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE IMPORTANT QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANT OF SUMMARY DISPOSITION TO THE DEFENDANTS ON THE BASIS OF THE ONE-YEAR LIMITATIONS PERIOD PROVIDED IN MCL 500.3145(1)?

Plaintiff-Appellant says "Yes."

Defendant-Appellee says "No."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This case arises out of a motor vehicle accident that occurred on February 28, 2009. On that date Dragen Perkovic was operating a semi-truck that he owned on eastbound I-80 in Nebraska. At the time, Mr. Perkovic was working as an independent contractor for E. L. Hollingsworth, a company to which he had leased the semi-truck.

As Mr. Perkovic was driving on I-80, the driver of another vehicle lost control of his car and spun in front of him. Mr. Perkovic swerved to avoid the car and he smashed his semi-truck into the median. Mr. Perkovic had to be taken by ambulance to the Nebraska Medical Center's emergency department for treatment of the injuries he suffered in the accident.

At the time of this accident, Mr. Perkovic had personal automobile insurance through Citizens Insurance Company of the Midwest (hereinafter: Citizens). Mr. Perkovic had also purchased additional "bobtail" insurance coverage through another insurer, Hudson Insurance Company (hereinafter: Hudson). In addition, E. L. Hollingsworth, the company for whom Mr. Perkovic was working at the time of the accident, had insurance through Zurich American Insurance Company.

On April 30, 2009, two months after Mr. Perkovic received emergency treatment at the Nebraska Medical Center, that institution sent a bill for the services it had provided to Mr. Perkovic along with various medical records to Zurich American Insurance Company (hereinafter: Zurich). A copy of the Nebraksa Medical Center bill is Exhibit A to this brief. The ten pages of medical records that were included with this billing are Exhibit B to this brief. On May 19, 2009, Zurich American sent the billing and medical records back to the Nebraska Medical Center. *See* Affidavit of James White, Exhibit C to this brief, ¶7. In returning this material, Zurich stamped on the billing:

"No injury report on file for this person." *See* Billing (Exhibit A).

In August 2009, Mr. Perkovic filed suit in the Wayne County Circuit Court for unpaid no-fault benefits arising out of the February 28, 2009 accident. In his original complaint, Mr. Perkovic named only Citizens as the insurer responsible for paying these benefits. Approximately six months later, Mr. Perkovic amended his complaint to add Hudson, the issuer on the bobtail policy. On May 25, 2010, he amended his complaint a second time, this time naming Zurich as a defendant.

With the addition of Zurich as a named defendant, the three insurers proceeded to resolve a priority dispute. The circuit court initially ruled that Citizens, as the insurer on Mr. Perkovic's personal policy, was the insurer responsible for the payment of his no-fault benefits arising out of the February 2009 accident. However, on reconsideration, the circuit court reversed itself and concluded that Hudson had to pay these benefits.

That ruling was appealed to the Court of Appeals. *Perkovic v Hudson Ins Co*, Court of Appeals No. 302868. On December 12, 2012, a panel of that Court issued a decision reversing the circuit court's ruling and concluding that it was Zurich that was responsible for paying Mr. Perkovic's no-fault benefits.[1]

Following remand to the circuit court, Zurich filed a motion for summary disposition. In that motion, Zurich argued that Mr. Perkovic's claims against it had to be dismissed under the limitation period provided in MCL 500.3145(1) because the date that Zurich was added to the case by amendment, March 25, 2010, was more than one year after Mr. Perkovic's accident.

Mr. Perkovic responded to Zurich's motion with the affidavit signed by James White, the

[1]This Court denied an application for leave to appeal that sought review of the Court of Appeals December 12, 2012 opinion. *Perkovic v Hudson Ins Co*, 493 Mich 971; 829 NW2d 197 (2013).

keeper of records for the Nebraska Medical Center, along with the billing and medical records that the Nebraska Medical Center mailed to Zurich in May 2009. White Affidavit (Exhibit C). Mr. Perkovic argued in his response to Zurich's summary disposition motion that the material mailed to Zurich by the Nebraska Medical Center in May 2009 took this case outside the one-year limitations period provided in MCL 500.3145(1).

The circuit court conducted a hearing on Zurich's motion on October 4, 2013 and it issued a written opinion granting that motion on February 20, 2014. A copy of that opinion is Exhibit D to this brief. In that opinion, the circuit court found that Mr. Perkovic's claim against Zurich was barred because it was filed more than one year after the February 28, 2009 accident. In reaching this result, the circuit court rejected Mr. Perkovic's argument that the Nebraska Medical Center's billing and medical records that were mailed to Zurich in May 2009 satisfied MCL 500.3145(1)'s notice provision. Despite recognizing that the materials mailed to Zurich "have all of the . . . information" required by MCL 500.3145(1), the circuit court found this material insufficient because "there is no indication that the documents were sent with the intent to file a claim." Opinion (Exhibit D), at 7-8.

Following the denial of a motion for reconsideration, Mr. Perkovic appealed the dismissal of his case to the Court of Appeals. On September 10, 2015, a panel of that Court issued a published decision affirming the circuit court's decision granting summary disposition to Zurich. A copy of the Court of Appeals decision is Exhibit E to this brief.

The Court of Appeals, after reviewing a series of decisions issued by that Court between 1980 and 1984, came to the following conclusion as to why Mr. Perkovic's cause of action was barred by the statute of limitations:

In this case, however, no letter or written notice form was sent that would alert

defendant to the possible pendency of a no-fault claim. *See Joiner,* 137 Mich App at 472. Rather, the medical bill and medical records were sent to defendant without any indication of a possible claim. In fact, according to White, the bill and records were sent for the purpose of obtaining payment. This notice of injury, which was unrelated to a possible claim for no-fault benefits, did not trigger defendant's investigative procedures or advise defendant of the need to appropriate funds for settlement. See *id.* at 471. Similar to the death certificate in *Heikkinen,* 124 Mich App at 464, the medical bill and medical records, although sufficient in content, did not fulfill the purposes of the statute. Accordingly, plaintiff did not provide sufficient notice pursuant to MCL 500.3145(1) and the trial court properly granted summary disposition in favor of defendant.

Opinion (Exhibit E), at 8.

ARGUMENT

I. THE COURT SHOULD EITHER GRANT LEAVE TO APPEAL OR SUMMARILY REVERSE THE COURT OF APPEALS DETERMINATION THAT SUMMARY DISPOSITION WAS APPROPRIATE UNDER THE ONE-YEAR LIMITATIONS PERIOD PROVIDED IN MCL 500.3145(1).

The circuit court and the Court of Appeals ruled in this case that Mr. Perkovic's claim against Zurich was untimely under MCL 500.3145(1). That statute provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

MCL 500.3145(1) states that an action for the recovery of no-fault benefits must be commenced within one year after the date of the accident. There are, however, two circumstances in which this one-year limitations period will not bar a claim. At issue in this case is one of these two exceptions.

MCL 500.3145(1) specifies that a suit filed more than one year after the accident will not be subject to dismissal on limitations grounds where "written notice of injury *as provided herein* has been given to the insurer within 1 year after the accident . . ." (emphasis added). The final sentence of MCL 500.3145(1) describes the contents of the written notice that will be sufficient to avoid the

one-year limitations period: "The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury." *Id*.

There is no dispute that Zurich was added to this case in May 2010, more than one year after Mr. Perkovic's accident. The question presented in this case, therefore, is whether the May 2009 material sent by the Nebraska Medical Center to Zurich constituted appropriate notice under §3145(1) to avoid the effect of that statute's one-year limitation period.

The circuit court made one critical and appropriate finding with respect to the material that the Nebraska Medical Center mailed to Zurich. The circuit court indicated in its February 14, 2014 opinion that "the bill and medical record in the present case have all the required information" called for by §3145(1). Opinion (Exhibit D), at 7-8. Thus, the circuit court acknowledged that the material sent by the Nebraska Medical Center provided "the name and address of the claimant" as well as "the time, place, and nature of his injury."

On appeal, the Court of Appeals reached precisely the same conclusion. In its September 10, 2015 opinion, the panel recognized:

> In this case, the medical bill and plaintiff's medical records listed "Dragen Perkovic" as the "insured" and provided his address of "3472 South Blvd, Bloomfield Hills, MI 48304." The medical records also indicated that Dragen Perkovic was the person injured, that he was admitted to The Nebraska Medical Center in Omaha, Nebraska, at 12:03 p.m. on February 28, 2009, after a car accident that occurred on the interstate, and that he suffered a back sprain, cervical sprain or fracture, chest wall contusion, contusion, head injury, liver injury, myocardial contusion, pneumothorax, splenic injury, sprained or fractured extremity." Thus, *the notice provided plaintiff's name and address, and indicated in ordinary language the name of the person injured and the time, place, and nature of his injury.* Additionally, the medical bill and medical records were given to defendant within one year after the accident, as the accident occurred on February 29, 2009, and the medical bill and medical records

were sent to defendant on April 30, 2009.

Opinion (Exhibit E), at 5 (emphasis added).

Despite the fact that the circuit court and the Court of Appeals found that the Nebraska Medical Center material satisfied all of the requirements set out in the final sentence of §3145(1), both courts found that Mr. Perkovic was not entitled to claim the exemption to the one-year limitations period that §3145(1) provides where notice is given within one year of the accident.

In reaching the results that they did, both the circuit court and the Court of Appeals were compelled to deviate from the actual language contained in §3145(1). Both courts focused, instead, on the underlying "purpose" or the "policy" behind §3145's notice requirement. Both courts determined that the Nebraska Medical Center's material was not sufficient to satisfy the "policy" or "purpose" behind §3145(1)'s notice exception to the one-year statute of limitations.

While the circuit court acknowledged that the information required under the final sentence of §3145(1) was provided to Zurich, it held that this written notice was not sufficient to avoid the one year limitation provided in that statute. The circuit court reached this conclusion on the ground that "there is no indication that the documents were sent with the intent to file a claim." Opinion (Exhibit D), at 8.

Thus, the circuit court ruled that the Nebraska Medical Center material did not meet the notice provision of §3145(1) because of the *purpose* for which that material was sent. According to the circuit court, the Nebraska Medical Center sent this billing material to obtain payment of Mr. Perkovic's accident-related medical expenses, not "for the purpose of opening a claim for personal injury protection no-fault benefits on behalf of Plaintiff." Opinion (Exhibit D), at 8. The circuit court further indicated that this material was not sufficient to take this case outside §3145(1)'s one-

year statute of limitations because Mr. Perkovic had not authorized the Nebraska Medical Center to request reimbursement from Zurich, nor was there "evidence that Plaintiff even had any knowledge that the Nebraska Medical Center billed Zurich for the services it rendered." *Id*.

Similarly, despite its finding that the contents of the material sent by Nebraska Medical Center met the requirements actually provided in §3145(1), the Court of Appeals concluded that this material was inadequate to serve the purposes of that statute. The essence of the Court of Appeals decision is captured in a single sentence in its September 10, 2015 decision: "the medical bill and medical records, *although sufficient in content*, did not fulfill the purposes" of §3145(1)'s notice provision. Opinion (Exhibit E), at 8.

The approaches taken by both the circuit court and the Court of Appeals to the statutory language at issue in this case are fundamentally at odds with this Court's repeated pronouncements as to how statutes are to be interpreted and applied. MCL 500.3145(1) specifies that a notice "*as provided herein*" will serve to exempt a case from the one-year statute of limitations. The final sentence of that subsection specifies precisely what that notice must contain to exempt the case from the one-year limitations period. If (as both the circuit court and the Court of Appeals found), the material sent to a no-fault insurer within one year of the injury meets the requirements of the final sentence of §3145(1), no further judicial construction is necessary and no consideration of the underlying "purpose" or "policy" behind this statute can allow a court to judicially add to that statutory language.

Over the past 15 years or so, this Court has repeatedly, consistently and emphatically made it clear how the courts of this state are to construe statutory language. The circuit court's and the

Court of Appeals interpretation of §3145(1) is in conflict with this substantial and ever-growing case law on the appropriate interpretation of statutes.

The goal of statutory interpretation is to give effect to the Legislature's intent. That intent is to be found in the language of the statute itself. As expressed by the Court in *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002):

> The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, *judicial construction is not permitted and the statute must be enforced as written*.
>
> *Id*., at 748 (emphasis added).

When the wording of a statute is unambiguous, "the Legislature must have intended the meaning clearly expressed and the statute must be enforced as written. No further judicial construction is required or permitted." *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014); *Malpass v Dept of Treasury*, 494 Mich 237, 249; 833 NW2d 272 (2013).

Thus, statutes are to be applied as they are written. Moreover, this commitment to the text contained in a statute cannot be altered by a court's perception of the underlying "purpose" or the "policy" behind that statute. As this Court indicated in *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005), "[t]his Court has been clear that the policy behind a statute cannot prevail over what the text actually says. The text must prevail." *Id*., at 421-422; *see also Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 285, n. 11; 696 NW2d 646 (2005) ("The words of any statute can be effectively undermined by a sufficiently generalized statement of 'purpose' that is unmoored in the actual language of the law.").

As part of its commitment to a textual approach to the interpretation of statutes, the Court has also made it clear in recent years that, in the course of interpreting a statute, a court is prohibited from adding language to that statute that the Legislature failed to include. *Omne Financial, Inc. v Shacks, Inc.*, 460 Mich 305, 311; 596 NW2d 591 (1999) ("nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself."); *Lesner v Liquid Disposal, Inc.*, 466 Mich 95, 101; 643 NW2d 553 (2002) (a court is to apply the statute "as enacted without addition, subtraction or modification."). Thus, the Court held in *Roberts v Mecosta County General Hospital*, 466 Mich 57; 642 NW2d 663 (2002):

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that the courts are to effect the intent of the Legislature. To do so, we begin with an examination of the language of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.

Id. at 63.

In light of the clarity with which this Court has spoken on the subject of statutory interpretation, the Court of Appeals treatment of the legal issue presented in this case is beyond perplexing. Prompted in part by five Court of Appeals opinions on the subject of "notice" that were written between 1980 and 1984, Opinion (Exhibit E), at 6-7, the Court of Appeals reached the conclusion that it could look beyond the actual language of §3145(1) to determine if the real "purposes" of the notice provision in that statute were served by the material mailed by the Nebraska Medical Center.

Completely omitted from the Court of Appeals analysis is that this Court has in recent years interpreted comparable "notice" statutes in such a way as to completely repudiate the early 1980's

vintage cases on which the Court of Appeals relied in this case. *See e.g. Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007); *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012); *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011); *Fairley v Dept of Corrections*, ___ Mich ___; ___ NW2d ___ (2015). Each one of these cases stands unequivocally for the proposition that a "notice" statute will be enforced as it is written, without reference to whether the underlying "purpose" behind that statute was or was not being served.

The Court of Appeals and the circuit court seriously erred when they went beyond the text of §3145(1) and engrafted onto that statute requirements that the Michigan Legislature did not incorporate into that statute's notice provision.[2]

Having found that the Nebraska Medical Center's notice met all of the requirements in §3145(1), the route that the Court of Appeals and the circuit court were to follow should have been clear. Since the one year limitations period of §3145(1) does not apply where there is "written notice of injury as provided herein," they had to conclude that Mr. Perkovic's cause of action was not barred even though it was filed more than one year after his accident.

There is, at least from plaintiff's perspective, a particular reason why a commitment to the literal text of §3145(1) is of particular significance. This statute has given rise to one of the most

[2]Moreover, it is completely irrelevant for purposes of the judicial interpretation of §3145(1) that the additional requirements read into the notice provision by the Court of Appeals or the circuit court might make for a "better" law. This Court has recognized that, "[t]he fact that a statute appears to be impolitic, unwise or unfair is not sufficient to permit judicial construction. The wisdom of a statute is for the determination of the Legislature and the law must be enforced as written." *Petripren v Jaskowski*, 494 Mich 190, 212, n. 50; 833 NW2d 247 (2013). Thus, the fact that the additional requirements adopted by the circuit court might "improve" the law does not provide a basis for going beyond the language selected by the Legislature.

explicit statements by this Court as to the limited role of the judiciary in altering a legislative framework.

In addition to the one-year statute of limitations for no-fault claims, §3145 also has a "one-year-back rule," a provision that prohibits a claimant from recovering for losses incurred more than one year before suit was filed. Beginning with *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), Michigan courts adopted a judge-made rule that had the effect of tolling this one-year-back rule from the time a claim for benefits was made to the date that the insurer formally denied liability. This common-law tolling principle significantly altered the impact of the statutory one year back rule.

In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), the Court put an abrupt end to this judicial gloss on the statutory one-year-back rule. The Court ruled in *Devillers* that, in light of the Legislature's adoption of the one-year-back rule, the courts in *Lewis* and later cases had usurped their roles in adopting a judicial rule that altered the effect of the time restraint the Legislature had imposed. The Court in *Devillers* expressed its view of the error committed in *Lewis* and subsequent cases as follows: "Statutory . . . language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court." 473 Mich at 582.

Until this particular case, the lesson taught by *Devillers* had not been lost on the Court of Appeals. In subsequent cases, the Court of Appeals recognized that §3145(1), "must be enforced 'as our Legislature has written it . . .'" *Henry Ford Health System v Titan Ins Co*, 275 Mich App 643, 647; 741 NW2d 393 (2007). The Court further ruled in *Titan Ins v North Pointe Ins Co,* 270 Mich 339; 715 NW2d 324 (2006), that §3145(1) "clearly and ambiguously states the necessary time line

of an action for personal protection insurance benefits," and where "the plain and ordinary meaning of the statute is clear, judicial construction is not permitted." *Id.*, at 345.

The Court of Appeals and the circuit court in this case made the same type of error that prompted this Court's decision in *Devillers*. They took unambiguous statutory language and placed on that language a judicial gloss that is not to be found in the statutory text. It is the statutory language that must control here, not perception of the "purposes" served by §3145(1)'s notice provision.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellant, Dragen Perkovic, respectfully request that this Court summarily reverse the Court of Appeals September 20, 2015 opinion and remand this case to the Wayne County Circuit Court for further proceedings. In the alternative, plaintiff requests that this Court grant leave to appeal to consider the question of whether the Court of Appeals properly interpreted MCL 500.3145(1).

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